IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFF,

VERSUS CIVIL ACTION NO. 4:92CV240-S-D

PLANTERS BANK & TRUST COMPANY, DEFENDANT.

MEMORANDUM OPINION GRANTING
SUA SPONTE MOTION FOR SUMMARY JUDGMENT

This cause is before the court on the sua sponte motion of the court for summary judgment. USF&G filed this action as a declaratory judgment against Planters Bank concerning a claim made by Planters on a financial institution bond. Planters filed an answer and a counterclaim demanding judgment in the amount of $637,600.73, plus prejudgment interest, costs, and punitive damages in the amount of $3,000,000.00. The court issued a memorandum opinion on USF&G's motion for partial summary judgment on October 17, 1994. Pursuant to said memorandum, the court's order declared and adjudged that the Financial Institution Bond Standard Form 24 (bond number 32-0020-10674-91-1), purchased by the defendant from the plaintiff, covered the $58,500.00 loss suffered by the defendant due to items negotiated by William C. Maloney into cash or cashier's checks. Since the matter was not before the court on cross motions for summary judgment, the court could not grant Planters a final judgment on its counter-claim for the $58,500.00.

A. Standard of Review

On a motion for summary judgment, the court must ascertain whether there is a genuine issue of material fact. Fed. R. Civ. P. 56(c). This requires the court to evaluate "whether there is the need for a trial--whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The United States Supreme Court has stated that "this standard mirrors the standard for directed verdict...which is the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed." Anderson, 477 U.S. at 250-51 (citation omitted). Further, the Court has noted that the "genuine issue" summary judgment standard is very similar to the "reasonable jury" directed verdict standard, the primary difference between the two being procedural, not substantive." Id. at 251. "In essence ...the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52. Further, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Id. at 252 (citation omitted).

In ruling on a motion for summary judgment, the court is not to make credibility determinations, weigh evidence, or draw from the facts legitimate inferences for the movant. Anderson, 477 U.S. at 255. Rather, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Anderson, 477 U.S. at 255. It should be pointed out, though, that if the " 'evidentiary facts are not disputed, a court in a nonjury case may grant summary judgment if trial would not enhance its ability to draw inferences and conclusions.' " In re Placid Oil Co., 932 F.2d 394, 398 (5th Cir. 1991) (quoting Nunez v. Superior Oil Co., 572 F.2d 1119, 1124 (5th Cir. 1978). As the Placid court recognized, "[I]t makes little sense to forbid the judge from drawing inferences from the evidence submitted on summary judgment when the same judge will act as the trier of fact, unless those inferences involve issues of witness credibility or disputed material facts." Id. (Emphasis added.) Once a properly supported motion for summary judgment has been filed, it is incumbent upon the nonmovant to go beyond the pleadings and arguments of counsel in order to establish that there is a genuine issue of material fact for trial. See generally, Professional Managers, Inc. v. Fawer, Brian, Hardy & Zatzkis, 799 F.2d 218, 221-23 (5th Cir. 1986).

Facts

USF&G executed and delivered a Financial Institution Bond Standard Form 24 (bond number 32-0020-10674-91-1) on January 1, 1991, to Planters Bank. Said bond is designed to act as an

insurance policy for certain losses incurred by Planters as explained within the language of the bond. The bond contains a single loss deductible of $50,000.00.

On May 19, 1992, Planters notified USF&G of a possible loss alleged to be covered by the bond. Subsequently, two proofs of loss were submitted by Planters. The claims involved certain alleged forgeries and fraud committed by William C. Maloney. William C. Maloney, Jr., stole checks from the law firm trust account of Townsend, McWilliams and Holladay and made forged deposits and negotiated forged trust account checks on the account. The check-kiting scheme involved the transfer of funds between the Townsend, McWilliams and Holladay trust account at Planters Bank, an account at the Sunburst Bank, and an account at the Bank of Ruleville. On September 23, 1992, USF&G denied Planters' claims. The total of the claims is $637,600.73.

Discussion

In the pertinent provisions of the bond, USF&G agreed to indemnify Planters for:

> ON PREMISES
>
> (B)(1) Loss of Property resulting directly from
> (a) robbery, burglary, misplacement, mysterious unexplainable disappearance and damage thereto or destruction thereof, or
>
> (b) theft, false pretenses, common-law or statutory larceny, committed by a person present in an office or on the premises of the Insured.
>
> while the Property is lodged or deposited within offices or premises located anywhere.

Planters suffered a loss in the amount of $58,500.00 that was received in cash or cashier's checks by Maloney when he negotiated, within the premises of Planters, forged stolen trust account checks. Planters argues that this loss comes within the "ON PREMISES" provision and, thus, is covered by the bond. USF&G maintains that $58,500.00 loss suffered by Planters come within an exclusion for funds which have not been finally paid.

The pertinent exclusion contained in the bond provides:

> (o) loss resulting directly or indirectly from payments made or withdrawals from a depositor's account involving items of deposit which are not finally paid for any reason, including but not limited to Forgery or any other fraud, except when covered under Insuring Agreement (A);

Although exclusion (o) historically was designed to exclude coverage for loss incurred due to a check-kiting scheme, the unambiguous language does not limit the exclusion to that type of loss. See Mitsui Mfrs. Bank v. Federal Ins. Co., 795 F.2d 827, 831 (9th Cir. 1986). The burden is upon the plaintiff to prove that this exclusion is applicable. "[W]here an exclusion is specifically pleaded as an affirmative defense the burden of proving such affirmative defense is upon the insurer;..." Sunday v. Lititz Mut. Ins. Co., 276 So.2d 696, 698 (Miss. 1973); see Sentry Insurance v. Weber Company, Inc., 2 F.3d 554 (5th Cir. 1993) (citing Texas statute) ("The insurer, however, bears the burden of establishing that one of the policy's limitations or exclusions constitutes an avoidance or affirmative defense to coverage.").

The forged checks cashed or converted to cashier's checks by Maloney personally at the Planters Bank are separate from the

check-kiting scheme. Maloney did not deposit these items into an account to receive immediate credit upon which to kite checks. Instead, he simply cashed forged checks. USF&G argues that Planters did not suffer a loss by these transactions, since the Townsend, McWilliams and Holladay trust account had sufficient funds to cover the forged checks. The fact that the trust account legitimately had sufficient funds on deposit at the time Maloney cashed the forged checks indicates that exclusion (o) does not apply. Exclusion (o) is dependent upon an account being improperly credited with deposits that have not been collected from the payor bank. Additionally, the argument ignores that the checks were forgeries negotiated on the premises of Planters. The $58,500.00 loss is covered by the "ON PREMISES" clause and not excluded by (o).

Accordingly, the sua sponte motion for summary judgment as to the defendant's counterclaim for $58,500.00 is appropriate and shall be granted. An order pursuant to this memorandum opinion shall be issued.

This the _____ day of February, 1995.

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CHIEF JUDGE